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Supreme Court, U. S.
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IN THE

Supreme Court of the United States

October Term, 1976.

No. 76-239

JAMES B. BAMFORD, Chairman; DAVID SHIREY, STEWART DE TURK, BOARD OF ASSESSMENT APPEAL, COUNTY OF BERKS, *Petitioners,*

v.

DONALD F. GARRETT, SHARON B. CARRETT, VERA A. TURPIN, *Respondents.*

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

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JAMES B. BAMFORD, CHAIRMAN; DAVID SHIREY, STEWART DeTURK, BOARD OF ASSESSMENT APPEAL, COUNTY OF BERKS,

Petitioners,

v.

DONALD F. GARRETT, SHARON B. GARRETT, VERA A. TURPIN,

Respondents.

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

—

Petitioners, James B. Bamford, Chairman, David Shirey, and Stewart DeTurk, members of the Board of Assessment Appeal, County of Berks, pray that a Writ of Certiorari issue to review the Opinion and Judgment of the Court of Appeals for the Third Circuit rendered in these proceedings on June 16, 1976.

OPINIONS BELOW.

The United States District Court for the Eastern District of Pennsylvania granted Petitioners' Motion to Dismiss the Complaint by Memorandum and Order dated May 20, 1976. *Garrett v. Bamford,* 394 F. Supp. 902 (E. D. Pa. 1975). The Memorandum and Order of the district court is printed at Appendix A, *infra* at pages A1 to A16.

On June 16, 1976, the Court of Appeals for the Third Circuit reversed the Order of the district court and remanded the case for further proceedings. The Opinion and Judgment of the Court of Appeals are as yet unreported and are printed at Appendices B and C, *infra* at pages A17 to A36 and A37 to A38, respectively.

JURISDICTION.

On July 2 and August 5, 1976, Petitioners filed Motions for Stay of Mandate pending application to this Court for a Writ of Certiorari, which the Court of Appeals granted by Orders dated July 9, and August 10, 1976, and which are printed at Appendices D and E, *infra* at pages A39 and A40, respectively.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1).

QUESTIONS PRESENTED.

The plaintiffs filed this class action in the United States District Court charging Petitioners with systematic and intentional racial discrimination in the assessment of plaintiffs' real property at disproportionately higher values than similar properties located in substantially all-white areas of the county. Plaintiffs prayed for preliminary and permanent injunctive relief restraining the alleged discriminatory tax assessment and further, sought annual reassessment under the district court's continued supervision to insure uniform and non-discriminatory assessments.

This Court has held ". . . the mere illegality or unconstitutionality of a *state* or *municipal tax* is not in itself a ground for equitable relief *in the courts of the United States.*" *Matthews v. Rogers,* 284 U. S. 521, 525-526 (1932); *Great Lakes Dredge & Dock Co. v. Huffman,* 319 U. S. 293 (1943) (Emphasis added).

Indeed, the prohibition of the Federal Tax Injunction Act of 1937 [1] and the principles of *Matthews* and *Great Lakes* have recently been reaffirmed by this Court. *Moe v. The Confederated Salish and Kootenai Tribes of the Flathead Reservation, et al.,* 44 U. S. L. W. 4535, 4537-8 (1976); *Steffel v. Thompson,* 415 U. S. 452, 472 (1974); *Lynch v. Household Finance Corp.,* 405 U. S. 538, 542, n. 6 (1972); and *Perez v. Ledesma,* 401 U. S. 82, 126-128 (1971), (Brennan, J. concurring).

The questions presented are these:

1. Did the Court of Appeals err in holding that 28 U. S. C. § 1341 does *not* bar plaintiffs' suit seeking to enjoin the assessment of local taxes because the Court of Appeals found that Pennsylvania law does not provide a "plain, speedy and efficient remedy" in that it fails to provide a statutory right to a class action suit?

2. Is the jurisdictional prohibition of 28 U. S. C. § 1341 inapplicable by reason of 28 U. S. C. § 1343(3) where, as here, the plaintiffs seek to enjoin the assessment of local taxes on federal constitutional grounds?

3. Did the Court of Appeals err in holding that Pennsylvania law fails to provide these plaintiffs ". . . a plain, speedy and efficient remedy . . ." by which to seek the necessary relief?

---

1. 28 U. S. C. § 1341 (1970) provides "the district courts shall not enjoin, suspend or restrain the assessment, levy or collection of any tax under State law where a plain, speedy and efficient remedy may be had in the courts of such State."

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED.

This case involves the Tenth and Fourteenth Amendments to the United States Constitution, which provide in relevant part:

"AMENDMENT X

The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."

"AMENDMENT XIV

. . . No *State* shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any *State* deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

This case involves §§ 1341 and 1343(3) of Title 28, United States Code, which provide as follows:

"§ 1341. *Taxes by State.*

The district courts shall not enjoin, suspend or restrain the assessment, levy or collection of any tax under State law where a plain, speedy and efficient remedy may be had in the courts of such State."

"§ 1343. *Civil rights and elective franchise.*

". . . (3) to redress the deprivation, under color of any State law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States or by any

Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States . . ."

This case also involves 72 P. S. §§ 5342, 5344, 5347, 5348, 5349, 5350 and 5350D which are printed in their entirety at Appendix F, *infra*, at pages A41 to A47.

STATEMENT OF THE CASE.

1. Procedural History Before the District Court.

On August 13, 1974, Donald F. and Sharon B. Garrett,[2] husband and wife, white homeowners/taxpayers and Vera A. Turpin,[3] a black homeowner/taxpayer, plaintiffs herein, filed this class action seeking to invoke the district court's jurisdiction pursuant to 28 U. S. C. §§ 1331(a) and 1343(3). The complaint alleges that the plaintiffs and the class they purport to represent own properties in residential areas of Berks County (Reading) Pennsylvania, populated predominantly by non-whites, which have allegedly been assessed at higher values than similar properties located in substantially all-white areas of the County.

Plaintiffs sought preliminary and permanent injunctive relief *restraining* the alleged discriminatory assessment as well as continuous annual supervision by the district court to insure uniform and non-discriminatory assessments.[4]

Defendants filed a Motion to Dismiss for lack of subject matter jurisdiction pursuant to Rule 12(b)(1) Federal Rules of Civil Procedure on the ground that *"the*

2. The Garretts sold their residence in November, 1975.

3. Vera A. Turpin, formerly Vera A. Anderson, filed an appeal in the Court of Common Pleas, Berks County, from her 1971 tax assessment. On August 2, 1972, the appeal was dismissed for her failure to appear and prosecute it.

4. The Complaint sets forth various violations of both federal and state law. Counts I and II allege violations of 42 U. S. C. §§ 1981, 1983 and the Fourteenth Amendment. Counts III and IV allege that such practices contravene Article I, § 2, and Article VIII, § 1 of the Pennsylvania Constitution as well as 72 Pa. S. § 5344(a). Count V charges that defendants failed to make annual assessments of "properties in predominantly or exclusively white areas which are increasing in value and in substantially non-white areas which are decreasing in value." Count VI goes on to characterize defendants' practices as unlawful discrimination in violation of the Equal Protection Clause of the Fourteenth Amendment.

district court shall not enjoin, suspend or restrain the assessment, levy or collection of any tax under State law where a plain, speedy and efficient remedy may be had in the courts of such State."

Following briefs and argument, the United States District Court, by the Honorable E. Mac Troutman, in an Opinion and Order, *infra, pages* A1-A16 dismissed the Complaint. In so doing, Judge Troutman analyzed the statutory relief available to plaintiffs under Pennsylvania law and found: (A5)

> "After assessments are completed, notice must be given to property owners whose assessments have been increased or decreased . . . persons who are aggrieved may appeal by notifying the Board of Assessment Appeals . . . Thereafter . . . the Board must hear all the assessment appeals after which appropriate orders for changes are incorporated into the tax rolls and sent to the appropriate political subdivisions . . . The taxpayer may appeal to the Court of Common Pleas . . . where, after a plenary hearing *de novo* and a finding that the assessment was erroneous the court may award an exoneration or restitution . . ."

The Court thereafter examined in depth the plaintiffs' contention that a Pennsylvania court of equity would not have jurisdiction in a case of this nature. Relying on decisions of the Pennsylvania Supreme Court in *Crossin v. Downingtown Area School District*, 440 Pa. 468, 270 A. 2d 377 (1970), and *Campbell v. Coatesville Area School District*, 440 Pa. 496, 270 A. 2d 385 (1970), Judge Troutman rejected this contention and found: (A10-A11)

> "Plaintiffs allege a substantial constitutional question, whether the disparity in assessments on a neighborhood-by-neighborhood basis violates the uniformity

> requirements of the State Constitution. In addition, only an equitable remedy is sought, namely, injunctive relief which does not seek primarily to invalidate or adjust the individual plaintiff's assessments, but is designed to remedy assessment patterns which serve defendants' alleged illegal policy of intentional discrimination against non-white residential neighborhoods. The particular pitch of this case we believe is such that it is cognizable in a court of equity in Pennsylvania, despite the contracted scope of equitable jurisdiction."

In light of definitive statutory remedies, and the availability of equitable jurisdiction, the court concluded that these plaintiffs had a "plain, speedy and efficient remedy" under Pennsylvania law.

Turning its attention to § 1341, the District Court, relying on *Great Lakes* and *Matthews v. Rogers, supra,* found: "The statute moreover codifies the long-standing, deeply rooted principle of federal equitable jurisdiction which restrains the federal courts from interference with the internal fiscal operations of the states" (A11), and that, "this federal policy is no less applicable to actions brought under the Civil Rights Act or those which involve constitutional challenges to state taxes and assessments" (A11), citing *Lynch v. Household Finance Corp.*, 405 U. S. 538, 543, n. 6 (1972).

Finally, Judge Troutman examined both 28 U. S. C. §§ 1341 and 1343(3) and found that it was not the intention of Congress to vest in the latter section jurisdictional precedence over the former.

2. The Opinion and Judgment of the Court of Appeals.

On June 16, 1976, a panel of the Court of Appeals for the Third Circuit[5] reversed the Order of the district

5. Before Gibbons, Forman and Rosenn, Circuit Judges.

court and remanded the case for further proceedings. In its Opinion, the Court of Appeals placed controlling significance on the fact that the Pennsylvania statutory remedy did not provide for a *class action suit.* The Court stated (A31):

> "The lack of a class action mechanism would impose substantial expense on plaintiffs' efforts to prove their case before the board and the common pleas court."

In considering the statutory remedies under 72 P. S. § 5342, et seq. the applicable provisions of which are printed at Appendix F, *infra,* pp. A41 to A47, the Court found that the statute created a 3-member board which *must* cause annual assessments, which *must* be completed by the 15th of August of each year and that property owners *must* be duly notified. Additionally, aggrieved persons have the right to ". . . appeal to the Board for relief." 72 P. S. § 5349(c). Parties are entitled to a hearing and ". . . the power to compel the attendance of witnesses and the furnishing of documents." 72 P. S. § 5349(d). An appeal de novo to the Court of Common Pleas is an absolute right as is an appeal from the Court of Common Pleas. 72 P. S. § 5350 (A30).

Finding an otherwise clearly defined and viable statutory remedy inadequate solely due to the unavailability of a class action, the Court of Appeals has, by its decision, judicially mandated the necessity for a statutory class action remedy under Pennsylvania law. Further, in reliance on the decision of the Pennsylvania Supreme Court in *Rochester & Pittsburgh Coal Co. v. Board of Assessment,* 438 Pa. 506, 266 A. 2d 78 (1970), the Court of Appeals determined that equitable jurisdiction over plaintiff's complaint *"appears"* to be barred, and thereafter concluded that in view of the lack of class action relief, and

the uncertainty of equitable jurisdiction, the plaintiffs did not have a "plain, speedy and efficient" remedy under Pennsylvania law.

The Court of Appeals narrowly construed § 1341 as having a two-fold purpose: ". . . eliminating unfair advantage of foreign corporations over citizens of the state and eliminating the ability of foreign corporations interminably to withhold payment of local taxes and to disrupt local financing." (A22). The Court of Appeals noted that such a circumscribed approach to § 1341 had not met with judicial favor (A21).

On July 2 and August 5, 1976, Petitioners filed Motions for Stay of Mandate pending application to this Court for a Writ of Certiorari which stay the Court of Appeals granted by Orders dated July 9 and August 10, 1976 printed at Appendices D and E, *infra* at pages A39 and A40.

REASONS FOR GRANTING THE WRIT.

I. The Conflict in the Circuits Concerning the Interpretation of § 1341 and the Adequacy of State Remedies Should Be Resolved.

The decision of the Court of Appeals for the Third Circuit is contrary to decisions of the First, Second, Fifth, Sixth, Seventh and Ninth Circuits. *Illinois Central R. R. v. Howlett,* 525 F. 2d 178 (7th Cir. 1975), *cert. denied* 44 U. S. L. W. 3532 (1976); *Miller v. Bauer,* 517 F. 2d 27 (7th Cir. 1975); *Gray v. Morgan,* 371 F. 2d 172 (7th Cir. 1966), *cert. denied* 386 U. S. 1033 (1967); *Aluminum Co. of America v. Dept. of Treas. of Michigan,* 522 F. 2d 1120 (6th Cir. 1975); *Mandel v. Hutchinson,* 494 F. 2d 364 (9th Cir. 1974); *Hickmann v. Wujick,* 488 F. 2d 875 (2d Cir. 1973); *American Commuters Assn. v. Levitt,* 405 F. 2d 1148 (2d Cir. 1969); *United States v. State Tax Commission,* 481 F. 2d 963, 972-976 (1st Cir. 1973); *Bland v. McHann,* 463 F. 2d 21 (5th Cir. 1972), *cert. denied* 410 U. S. 966 (1973).

These appellate courts faced with the precise issue involved herein under strikingly similar circumstances have consistently followed the dictates of *Matthews, Great Lakes, Lynch* and *Perez,* and have denied jurisdiction on the basis of § 1341. Indeed, the Court of Appeals for the Third Circuit's opinion is singularly contrary, thereby creating a *split* of *authority* on this extremely important issue.

In *Bland v. McHann,* 463 F. 2d 21 (5th Cir. 1972), *cert. denied,* 410 U. S. 966 (1973), black property owners/taxpayers brought an action pursuant to §§ 1983 and 1343 against the local taxing authority seeking injunctive relief alleging discriminatory assessments. Affirming the district

court's refusal to entertain jurisdiction due to § 1341, the Fifth Circuit stated at page 24:

> "We are convinced that both longstanding judicial policy and congressional restriction of federal jurisdiction in cases involving state tax administration make it the *duty* of federal courts to withhold relief when a state legislature has provided an adequate scheme whereby a taxpayer may maintain a suit to challenge a state tax. The taxpayer may assert his federal rights in the state courts and secure a review by the Supreme Court." (emphasis added).

The Court in *Bland* noted that the taxpayers' objections to the state remedy were primarily that it was ". . . too costly and too uncertain to provide the 'plain, speedy and efficient remedy' called for by § 1341," *supra* at page 28, and that Mississippi procedure did not permit a *class action suit*. The Court rejected these and other alleged infirmities of Mississippi law and found, ". . . the Mississippi remedy is plain, speedy and efficient," in that, ". . . the Mississippi remedy . . . contemplates that the taxpayers' claim may be pursued to the state supreme court. Final rejection there would permit review by the United States Supreme Court. This is the appropriate procedure to pursue," *supra* at page 29.[6]

The plaintiffs in the instant case have similar statutory remedies as in *Bland* and although the Court of Appeals

6. The Mississippi Constitution requires that taxation be uniform and equal throughout the state and that properties be taxed in proportion to their value. The Mississippi assessment scheme provides for *notice* that the rolls have been equalized and means for the hearing of the objections of taxpayers and for an appeal to the circuit court where the issue is tried de novo. Another statute provides for an appeal as a matter of right to the Mississippi Supreme Court. In addition, § 1340 of the Mississippi Code permits one or more taxpayers to enjoin the collection of any taxes levied or attempted to be collected without authority of law.

cited *Bland*, A18, no attempt was made to distinguish the contrary decision arising from parallel facts.

In *American Commuters Assn. v. Levitt*, 405 F. 2d 1148 (2d Cir. 1969), the complaint sought to enjoin the enforcement of a non-resident income tax. Affirming the grant of a motion to dismiss, the Court bluntly rejected any notion that § 1343(3) confers jurisdiction by stating at pages 1150-1151:

> "Appellants would have us hold that a plaintiff may avoid the prohibition contained in § 1341 by basing his complaint upon 28 U. S. C. § 1343(3) and 42 U. S. C. § 1983. The Seventh Circuit faced the same contention in Gray v. Morgan, 371 F. 2d 172 (1966), cert. denied 386 U. S. 1033 and concluded: 'Under the circumstances present here we find nothing in the history or construction of the civil rights statutes, § 1343, to indicate its concern with the validity of a state tax as a revenue measure.'"

Noting this Court's two brief per curiam opinions in *Houghton v. Scranton*, 392 U. S. 639 (1968), and *Damico v. California*, 389 U. S. 416 (1967), and distinguishing them, the Second Circuit in *Levitt* held that ". . . § 1341 means what it so plainly says and that federal jurisdiction is still precluded . . .", *supra* at p. 1151, this being true notwithstanding the constitutional attack based upon §§ 1983 and 1343(3).

The alleged lack of class action relief under Pennsylvania law, which the Court of Appeals for the Third Circuit found justified a departure from § 1341, has recently been raised and rejected in *Miller v. Bauer*, 517 F. 2d 27, 32 (7th Cir. 1975), wherein the Court stated:

> "We find that plaintiffs' contention [that these remedies are inadequate in that there is no provision for

a class action] unpersuasive. Since the legal claims of the plaintiffs and their fellow class members are allegedly the *same* one suit should be sufficient to determine the *constitutionality* of the tax. [Citing *Matthews v. Rogers, supra*]. Moreover, the State Board itself could upon being made aware of the situation through a single claim, order reassessment of the entire area involved . . . We will not *assume* that the Board would *fail* to perform its duty under the Constitution or the Indiana statutes." (emphasis added).

Nor does the instant case pose the "extraordinary circumstances" present in *Griffin, Inc. v. Tully*, 404 F. Supp. 738, 745 (U. S. D. C., D. Vt. 1975), *prob. juris. noted* 44 U. S. L. W. 3470, justifying a departure from § 1341. Judicial review of the tax assessment ($298,580.59), in *Griffin* was all but precluded due to the prepayment or bond requirement which plaintiff could ill afford. Finding that the assessment in *Griffin* was "admittedly arbitrary", *supra* at 744, and recognizing the general rule that a state may require a taxpayer to litigate from a refund posture, the court in *Griffin* held ". . . in some instances the assessment poses such a heavy burden that to deny equitable relief is to deny judicial review entirely. . . . In such instances, a federal court may award equitable relief.", *supra* at 744-45. (Citations omitted).

As was the case in *Bland v. McHann, supra*, so is it here. The plaintiffs in reality seek what they believe is a better remedy notwithstanding the fact that the remedy they have is "*plain, speedy and efficient.*"

II. The Decision of the Court Below Is in Direct Conflict With Controlling Decisions of This Court Which Have Repeatedly Barred Anticipatory Adjudication of the Validity of State Tax Laws.

Despite the recognition that this Court has ". . . repeatedly barred anticipatory federal adjudication of the validity of state tax laws . . .", notwithstanding federal constitutional challenges, *Lynch v. Household Finance Corp., supra* at 542, n. 6, the Court of Appeals here has fashioned its own definition of *adequacy* by establishing an *absolute right* to statutory *class action* relief under Pennsylvania law which otherwise did not exist.

This Court has recently reaffirmed the continued viability of *Matthews v. Rogers*, 284 U. S. 521 (1932), and *Great Lakes Dredge & Docks Co. v. Huffman*, 319 U. S. 293 (1943), regarding the interpretation of § 1341. *Moe v. The Confederated Salish & Kootenai Tribes of the Flathead Reservations*,[7] *supra*. Although *Moe* is factually distinguishable from the present case,[8] the underlying philosophy of § 1341 restricting federal courts from enjoining, suspending or restraining the assessment of state taxes is reaffirmed. In affirming the district court's grant of injunctive relief, this Court cautioned that:

> ". . . we do not believe that the District Court's expanded version of [the intergovernmental immunity] doctrine . . . can by itself *avoid the bar* of § 1341." 44 U. S. L. W. at 4538 (emphasis added).

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7. *Moe* was decided subsequent to oral argument, but prior to the decision in the instant case.

8. An Indian tribe and its members *residing* on the reservation brought an action seeking declaratory and injunctive relief challenging Montana's cigarette sales tax, personal property tax and the vendor licensing statute as they apply to *reservation* Indians.

Finding that the district court relied as well upon 28 U. S. C. § 1362 [9] as a basis of jurisdiction, the Court, speaking through Mr. Justice Rehnquist, stated at page 4538:

> ". . . the mere fact that a jurisdictional statute such as 1362 speaks in general terms of 'all' enumerated civil actions *does not itself* signify that Indian tribes are exempted from the provisions of 1341." (emphasis added).

Following a review of the legislative history of § 1362, and finding sufficient indication therein of congressional intent to confer jurisdiction in the federal courts thereunder, notwithstanding § 1341, the Court stated:

> "While this is hardly an unequivocal statement of intent to allow such litigation to proceed irrespective of other explicit jurisdictional limitations such as § 1341, it would appear that Congress contemplated that a tribe's access to federal court to litigate a matter arising 'under the Constitution, laws and treaties' would be at least in some respects as broad as that of the United States suing as the tribe's trustee." 44 U. S. L. W. at 4538.

As § 1341 and § 1362 do not "cross reference with each other", and whereas "the United States could have brought these actions by itself or as co-plaintiff", *supra* at 4538, this Court found that § 1362 takes jurisdictional precedent over §1341 and confers jurisdiction.

Although the *district* court in *Moe* assumed jurisdiction on the basis of § 1343(3) that issue was explicitly left

9. "Indian tribes—The district court shall have original jurisdiction of all civil actions brought by any Indian tribe or band with a governing body duly recognized by the Secretary of the Interior, wherein the matter in controversy arises under the Constitution, laws or treaties of the United States."

undecided by this Court's opinion. However, to urge that § 1341 is inapplicable solely by reason of § 1343(3) would be contrary to other decisions of this Court and the clear implications of *Moe*. *Lynch v. Household Finance Corp., supra* at p. 542, n. 6, and *Perez v. Ledesma, supra* at 126-128, n. 17 (Brennan, J. concurring).

In the instant case, the Court of Appeals for the Third Circuit has failed to heed this Court's decisions which ". . . have repeatedly barred anticipatory federal adjudication of the validity of state tax laws . . .", which is ". . . consistent with congressional restriction of federal jurisdiction in this special class of cases, and with long-standing judicial policy." [10] *Lynch, supra* at 542, n. 6.

This brings us to the Pennsylvania remedies available to these plaintiffs. The Court of Appeals relied heavily upon *Rochester and Pittsburgh Coal Company v. Board of Assessment*, 438 Pa. 506, 266 A. 2d 78 (1970), in holding that there is ". . . substantial uncertainty as to the availability of a Pennsylvania equity forum for the instant complaint." (A29).

More recently, the Pennsylvania Supreme Court has decided *Borough of Green Tree v. Board of Property*

10. The only deviation from this long-standing federal policy appears in *Hillsboro Township v. Cromwell*, 326 U. S. 620 (1946), wherein this Court found exceptional circumstances justifying a departure from *Matthews* and *Great Lakes, supra*. The Court in *Hillsboro* found that New Jersey law absolutely prohibited a taxpayer from demanding a reduction of his own property valuation based upon discriminatory assessments. His only remedy was to seek the increase in the assessed valuation of others. The Court found that this inherently violated the Equal Protection Clause of the Fourteenth Amendment. In addition, the Court found that the State Board of Tax Appeals concededly could not pass upon constitutional issues and, its decisions were not appealable de novo or capable of being reviewed by the New Jersey appellate courts. Under the facts in *Hillsboro*, not only was there an inadequate remedy, there was absolutely no vehicle by which taxpayers could assert and perfect their constitutional rights. *Hillsboro* is decidedly different from the case at bar and any reliance thereon would be misplaced.

Assessments, 328 A. 2d 819 (1974). In *Green Tree*, the plaintiffs filed suit in equity challenging the constitutionality of certain sections of the second class assessment law as well as the *method* of assessment. Under either challenge, plaintiffs claimed that they were being subjected to violations of the uniformity clause of the Pennsylvania Constitution, Article VIII, § 1 [11] and the Equal Protection Clause of the Constitution of the United States.

Candidly recognizing the conflict in its prior decisions, principally *Lynch v. Owen J. Roberts School District*, 430 Pa. 461, 244 A. 2d 1 (1968), and *Rochester, supra*, the Pennsylvania Supreme Court in *Green Tree* stated at page 823:

> ". . . the mere fact that a constitutional question is raised as to the validity of a statute does not, without more, vest jurisdiction in a court of equity to adjudicate. The additional element required to confer equitable jurisdiction is either the absence of a statutorily-prescribed remedy or, if such remedy exists, then a showing of its inadequacy in the circumstances."

Finding that the plaintiff had lost their statutorily-prescribed remedy beyond recall by failure to file appeals within the required period of time and ". . . coupled with our basic finding of the presence of a substantial question of *constitutionality* going directly to the validity of the *assessment scheme* . . ." (page 825) (emphasis added), the Court determined that equitable jurisdiction would lie.

As in the instant case, where plaintiffs have alleged constitutional violations of Articles I and VIII of the Pennsylvania Constitution, as well as the Fourteenth Amendment, directly challenging the validity of the county assessment scheme, it is, in view of *Green Tree*, error to *assume* that these plaintiffs would not find an equitable forum in Pennsylvania. However, the real test is whether these plaintiffs had an adequate remedy at law under the applicable Pennsylvania statute.

11. "All taxes shall be uniform upon the same class of subjects within the territorial limits of the authority levying the tax and shall be levied and collected under general laws."

It cannot seriously be disputed that the Court of Appeals found the statutory remedy inadequate due solely to its lack of "class action mechanism", which is contrary to other decisions which have considered that precise issue (see p. 11, *supra*). In this regard, the Court of Appeals cited *Sharkey v. Showers*, 18 Pa. Comm. 363, 336 A. 2d 453 (1975), for the proposition that the plaintiffs are prohibited from filing an appeal in the form of a class action suit in the Court of Common Pleas from a decision of the Board of Assessment Appeal. On the contrary, it is urged that *Sharkey* holds that a class action does not lie when the members of the class have failed to exhaust their administrative remedies. Those individual taxpayers who pursue their statutory remedy before the Board of Assessment Appeal may thereafter appeal as a class to the Court of Common Pleas.

III. The Questions Involved Are of Exceptional Importance.

Under the Tenth Amendment one of the most vital sovereign powers reserved to the States and their political subdivisions is the power to assess, levy and collect taxes to finance essential governmental functions. Necessary to this task is the ability of political subdivisions to raise monies by the issuance of notes and bonds to insure their continued existence and operation. The power to budget, to assess, levy and collect taxes and to issue and sell evi-

dence of indebtedness is the primary core of any governmental entity.

Petitioners, as the local governmental unit, having the statutory authority and obligation to decide these *local* taxing matters should be permitted to do so free of federal governmental intrusion. This is inherent in our federal system of dual sovereignties and has always and unquestionably been considered a fundamental doctrine of the United States Constitution.

The decision of the Court of Appeals affects all 67 counties in the Commonwealth of Pennsylvania and will disrupt well-settled local governmental functions. It severely jeopardizes the *local* government's ability to budget, levy and collect taxes and to issue and sell evidence of indebtedness.[12] Indeed, the decision of the Third Circuit has national impact, for if it is the law, unless the states of the union provide an *absolute right to class action* relief, their present statutory remedy will not pass constitutional muster. Stated otherwise, the Court of Appeals' decision means that any homeowner/taxpayer who *alleges* a § 1981 and § 1983 violation regarding a *local* taxing authority has an absolute right to assert class action relief *in the courts of the United States,* assuming such relief is unavailable under state law.

The Third Circuit's decision, contrary to six other circuits, will induce much additional litigation imposing great burdens on the federal court system and the parties for what is in reality a *local* taxing matter. The issues presented, therefore, are vital to our system of government.

12. It would be naive to assume that an attack upon the *method of assessment* would not seriously jeopardize the levy and ultimate collection of the tax.

CONCLUSION.

For the reasons set forth above, it is respectfully submitted that this petition for certiorari should be granted to review the Opinion and Judgment of the Court of Appeals.

Respectfully submitted,

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APPENDIX A.

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Civil Action No. 74-2103

DONALD F. GARRETT
SHARON B. GARRETT
VERA A. TURPIN

v.

JAMES B. BAMFORD, CHAIRMAN
DAVID SHIREY
STEWART DeTURK
BOARD OF ASSESSMENT APPEALS
COUNTY OF BERKS

Memorandum and Order.

TROUTMAN, J. MAY 20, 1975

In this action plaintiffs charge defendants with violations of the Civil Rights Act, 42 U. S. C. §§ 1981, 1983, certain Pennsylvania statutes, the Fourteenth Amendment, and Articles I and VIII of the Pennsylvania Constitution. The named plaintiffs and the class of persons they purport to represent own properties in residential areas of Reading and Berks County, populated predominantly by non-whites, which have allegedly been assessed for taxation by defendants at disproportionately higher values than similar properties located in substantially all-white areas. Defendants, members of the Board of Assessment Appeals of Berks County, are alleged to have systematically and

intentionally discriminated against plaintiffs by assessing their properties at higher percentages or ratios of actual value causing plaintiffs to pay disproportionately high taxes. Plaintiffs do not seek a reduction in their individual assessments *per se;* they pray for preliminary and permanent injunctive relief restraining such alleged violations of state and federal law by requiring a reassessment, under this Court's immediate and continuous supervision, of all owner-occupied residential property in defendants' jurisdiction and the yearly submission of proof that such new assessments are uniform and non-discriminatory. Defendants have responded with a motion to dismiss the complaint for lack of subject-matter jurisdiction under F. R. Civ. P. 12(b)(1) which is now before the Court.[1]

The complaint sets forth violations of both federal and state law. Counts I and II allege violations of 42 U. S. C. §§ 1981 [2], 1983 [3] and the Fourteenth Amendment in that defendants assessed plaintiffs' property at disproportionately high ratios compared to assessments of similar property in exclusively white areas of population concentration. Counts III and IV allege that such practices contravene Article I, § 2 and Article VIII, § 1 of the Pennsylvania Constitution [4] as well as 72 P. S. § 5344(a) [5]. Count V charges that defendants failed to make annual assessments of "properties in predominantly or exclusively white areas which are increasing in value and in substantially non-white areas which are decreasing in value." Finally, Count VI characterizes defendants' practice as unlawful discrimination based on economic status in violation of the Equal Protection Clause of the Fourteenth Amendment.

The keystone of defendants' motion to dismiss for lack of subject-matter jurisdiction rests on the Tax Injunction Act, 28 U. S. C. § 1341, which provides:

> "The district courts shall not enjoin, suspend or restrain the assessment, levy or collection of any tax under State law where a plain, speedy and efficient remedy may be had in the courts of such State."

As defendants characterize this action, this federal court *prima facie* lacks jurisdiction because the injunctive relief

1. There are outstanding motions filed by plaintiffs pertaining to certification of a class action and to discovery which are mooted by our disposition of defendants' motion as discussed hereafter.

2. 42 U. S. C. § 1981 states:

> "All persons within the jurisdiction of the United States shall have the same right in every State • • • to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pain, penalties, taxes, licenses and exactions of every kind, and to no other."

3. 42 U. S. C. § 1983 provides:

> "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

4. Article VIII, Section 1, provides:

> "All taxes shall be uniform, upon the same class of subjects, within the territorial limits of the authority levying the tax, and shall be levied and collected under general laws."

5. 72 P. S. § 5344(a) states:

> "(a) It shall be the duty of said board [of Assessment Appeals], in each county to which this act applies, to make and have supervision of the making of annual assessments of persons, property and occupations now or hereafter made subject to assessment for taxation for county, borough, town, township, school, poor and institution district purposes, and to make and have supervision of listing and valuation of property excluded or exempted from taxation. *In making assessments of property at less than actual value, it shall accomplish equalization with other properties within the taxing district.* The making of triennial assessments as provided by existing law is hereby abolished." [Emphasis added.]

sought would perforce require the invalidation of the current assessments of relevant properties in the county. And, as plaintiffs have a plain, speedy and efficient remedy in the courts of Pennsylvania, i.e., by filing a bill in equity or in pursuing the applicable statutory procedure for assessment appeals, this Court must refrain from intermeddling into what is a purely localized fiscal function conducted by county officials in their administrative capacity. Plaintiffs counter that the statutory procedure for assessment appeals is defective and, therefore, inadequate for two reasons: first, individual appeals of assessments by plaintiffs would entail a piecemeal, cumbersome and lengthy process which, in the final analysis, would not yield the broad injunctive relief they now seek. Second, this procedure is attacked on the ground that it is incapable of dealing effectively with and eradicating alleged neighborhood-by-neighborhood discrimination because the proof required in each assessment appeal would involve a comparison of the subject property only with similar properties in the *same* area. This procedure, plaintiffs contend, could only perpetuate the alleged neighborhood-by-neighborhood pattern of discrimination. In addition, it is asserted that equitable relief is not available under current pertinent Pennsylvania cases which have uniformly narrowed the taxpayers' remedy to an attack on assessments by the statutory procedure, rather than by a bill in equity, thus leaving plaintiffs without a plain, speedy and efficient remedy in the State courts. Finally, plaintiffs urge that the paramount national policy as codified in the Civil Rights Acts and refined by thousands of court decisions overrides the restrictive federal jurisdictional limits of the Tax Injunction Act.[6]

6. Plaintiffs also assert that jurisdictional facts are in dispute so that the motion cannot be decided properly at this procedural juncture. The plaintiffs, however, have not demonstrated with

The sole issue raised by defendants' motion is whether the jurisdictional limitation of § 1341 should apply in this case, and in resolving the question, we are required to canvass the gamut of remedies which are available to plaintiffs in the courts of Pennsylvania by utilizing the statutory procedures or by proceeding in equity.

At the outset, we note that the applicable procedure to appeal assessments under Pennsylvania law is set forth in 72 P. S. §§ 5348, 5349, and 5350. After assessments are completed, notice must be given to property owners whose assessments have been increased or decreased. § 5349 provides that persons who are aggrieved[7] may appeal by notifying the Board of Assessment Appeals (defendants herein) prior to September 1. Thereafter from September 1 to October 1, the Board must hear all the assessment appeals, after which appropriate orders for changes are incorporated into the tax rolls and sent to the appropriate political subdivisions. 72 P. S. § 5349. The taxpayer may appeal to the Court of Common Pleas, § 5350, where, after a plenary hearing *de novo* and a finding that the assessment was erroneous, the Court may award an exoneration or restitution under § 5350d. § 5350 requires the Court "to make such changes therein as may be right and proper", and further provides:

6. (Cont'd.)
specificity which facts are disputed on the jurisdictional issue and, as we construe this action, the only relevant questions are matters of law which are now ripe for a decision.

7. 72 P. S. § 5349(c) states:

"Any person aggrieved by any assessment, whether or not the value thereof shall have been changed since the preceding annual assessment, or any taxing district having an interest therein, may appeal to the board for relief. Any person or such taxing district desiring to make an appeal shall, on or before the first day of September, file with the board an appeal, in writing, * * *".

> "° ° ° the Court shall determine, from the evidence submitted at the hearing, what ratio of assessed value to actual value was used generally in the taxing district, and the court shall direct the application of the ratio so found to the value of the property which is the subject matter of the appeal, and such shall be the assessment. ° ° °"

Plaintiffs argue that the comparison of valuation is limited to properties within the same neighborhood to support the proposition that the statutory remedy is inadequate. *Appeal of Brooks Building*, 391 Pa. 94 (1958); *Appeal of Charlotte E. Rick*, 402 Pa. 209 (1961). As plaintiffs put it, these remedies are "unsuited for the correction of discrimination between entire neighborhoods and are thus inadequate remedy for the correction of wholesale discrimination." (Brief at page 9). Moreover, plaintiffs point to the statutory burden imposed upon them to prove that an individual assessment is improper, 72 P. S. § 5350(b),[8] and argue that the procedure unfairly pits the property owner, with limited resources and experience, against the board, armed with the expertise developed in numerous assessments and appeals therefrom.

Thus, from the foregoing overview of the assessment appeal procedure outlined by statute, plaintiffs contend that the *precise* relief sought by plaintiffs is not within the power of the Board of Assessment Appeals to grant. So construed, plaintiffs understandably contend that the

8. 72 P. S. § 5350(b) states:

"(b) In any appeal by a taxable from an action by the board, the board shall have the power and duty to present a prima facie case in support of its assessment, to cross-examine the taxable's witnesses, to discredit or impeach any evidence presented by the taxable, to prosecute or defend an appeal in any appellate court, and to take any other necessary steps to defend its valuation, assessment and assessment ratio."

statutory remedy is "inadequate" and, therefore, not a "plain, speedy and efficient remedy" within the meaning of § 1341. Such conclusion presupposes that the statute will be so literally and limitedly construed as to preclude the resolution of inequitable neighborhood-by-neighborhood assessments. True, the statute, on its face, is understandably designed to take care of the usual, ordinary and expected situation involving individual appeals within a taxing district and a neighborhood. However, we cannot assume that the use, for example, of multiple or mass appeals within and across neighborhood lines or other possible procedures combined with the ingenuity expected of assessment authorities to reach the inequities, if any, presented and proved, will not obtain a decision on the issues presented notwithstanding facial deficiencies as to the individual taxpayer's remedies in the statute. Indeed, something not unlike a mass appeal is contemplated by the statute. Specifically, § 5350i provides:

> "The corporate authorities of any borough, town, township, school and poor district, who may feel aggrieved by any assessment of property or subjects of taxation for its corporate purposes, shall have the right to appeal therefrom in entirety or by individual assessments to the board or to the court of common pleas or the Superior or Supreme Court in the same manner, subject to the same procedure, and with like effect as if such appeal were taken by a taxable with respect to his assessment, and in addition may take an appeal from any decision of the board or court of common pleas as though it had been a party to the proceedings before such board or court even though it was not such a party in fact."

The procedure utilized by a Board of Assessment Appeals to dispose of such an appeal by a school district,

for example, must encompass the simultaneous consideration of many properties. Here the relief sought by plaintiffs involves the identical proposition—simultaneous consideration of many properties. Methods employed by the Board in discharging its statutory duties outlined in § 5350i are logically no less applicable or inappropriate for reaching the end plaintiffs seek here.

Thus, in accordance with the congressional intention expressed in § 1341, the state administrative authorities should be given the first opportunity to face and resolve the issue. Failing in that, an appeal to the state court is provided by the statute. Here, the ingenuity of the state court in the realistic and non-technical construction of the state statute can reasonably be assumed to reach the issues fairly presented. That the state authorities and the state courts should so construe the state statute as to reach the issues rather than evade them and thus force the plaintiffs into the federal courts is not and should not be an unexpected result. No precedent has been cited establishing that the state assessment authorities and the courts will not squarely meet and resolve the issues raised without federal intervention.

Therefore, we cannot, at this time, reach the conclusion that the plaintiffs are without a plain, speedy and efficient remedy in the state courts. Rather, until the state authorities and the state courts demonstrate otherwise, we find to the contrary.

Turning to the second prong of plaintiffs' attack, that equity does not have jurisdiction in a case of this nature, plaintiffs cite two recent cases: *Allegheny Co., So. Dist. Tax Assess. AP.*, 7 Pa. Commonwealth Ct. 291 (1972) and *Rochester & Pgh. C. Co. v. Ind. Co. Bd. of A.*, 438 Pa. 506 (1970). In *Rochester*, the plaintiff sought to enjoin the application of a revised method of taxation on the grounds that the rates and classifications violated the

Equal Protection Clause of the Fourteenth Amendment and the Uniformity Clause of the Pennsylvania Constitution, Art. VIII, § 1. The Supreme Court affirmed the dismissal of the bill in equity because the taxpayer had an adequate remedy at law, stating:

> "• • • [W]hat is required to confer jurisdiction on an equity court is the existence of a substantial question of constitutionality (and not a mere allegation) and the absence of an adequate statutory remedy." [footnote omitted] 438 Pa. 508.

However, the Court did *not* hold that equity jurisdiction could *never* be invoked, only that

> "• • • Expertise in this field lies in the administrative bodies, and we should be slow, as far as jurisdiction is concerned, to favor equity courts over them. • • •" Fn. 1 at 438 Pa. 508.

Later, in the *Allegheny* case, the Commonwealth Court sustained preliminary objections to a bill in equity brought by sixteen municipalities and a number of taxpaying residents of said municipalities, which attacked a system of triennial assessments as a violation of the Equal Protection Clause of the Fourteenth Amendment and Article VIII, § 1 of the Pennsylvania Constitution. Relief sought included an order that all increased assessments be held in abeyance; a suspension of all such increases; an injunction against the levy and collection of any taxes due to the increased assessments. Citing *Rochester*, the Court stated:

> "• • • [E]ven a direct challenge to 'the intrinsic constitutionality of a taxing scheme' is not alone sufficient to confer jurisdiction on a Court of Equity—

there must also be the absence of an adequate remedy at law." 7 Pa. Commonwealth Ct. 298.

Then, characterizing the gist of the action as follows,

> "And because it is the amount of a property owner's assessment which is the basic issue, the Board ought to be permitted to pass upon the assessment in the first instance," *Id.* at 302.

the Court rejected plaintiffs' arguments that the Board was incompetent to pass upon constitutional questions, that a multiplicity of actions would thus be encouraged, and that plaintiffs were suffering irreparable harm. We conclude, however, that these cases are not convincing support for the proposition plaintiffs have advanced here.

A series of other cases indicates that equitable jurisdiction is appropriate in certain, albeit limited, circumstances. *Nearhood v. Pearson,* 374 Pa. 299 (1953); *Y. M. C. A. v. City of Reading,* 402 Pa. 592 (1961); *Crosson v. Downingtown Area School District,* 440 Pa. 468 (1970); *Campbell v. Coatesville Area School District,* 440 Pa. 496 (1970). *See also Phipps v. School District of Pittsburgh,* 111 F. 2d 393 (3rd Cir. 1940); *Guerra v. City of Philadelphia,* 30 F. Supp. 791 (E. D. Pa. 1940). "Plaintiffs allege a substantial constitutional question, whether the disparity in assessments on a neighborhood-by-neighborhood basis violates the uniformity requirements of the State Constitution. In addition, only an equitable remedy is sought, namely, injunctive relief, which does not seek primarily to invalidate or adjust the individual plaintiff's assessments, but is designed to remedy assessment patterns which serve defendants' alleged illegal policy of intentional discrimination against non-white residential neighborhoods. The particular pitch of this case, we believe is such that it is cognizable in a court of equity in

Pennsylvania, despite the contracted scope of equitable jurisdiction."

Under the Tax Injunction Act, federal courts are divested of subject-matter jurisdiction when the remedy in state courts is "plain, speedy and efficient". The test is whether the remedy is adequate, *Spector Motor Service, Inc. v. O'Connor,* 340 U. S. 602 (1951), and it need not be "the best remedy available or even equal to or better than the remedy which might be available in the federal courts", *Bland v. McHann,* 463 F. 2d 21, 29 (5th Cir.) *cert. denied* 410 U. S. 966 (1973). Even the unlikelihood of success in the state court is not sufficient to carry a case beyond the prohibition of the Injunction Act, *Non-Resident Taxpayers Association v. Philadelphia,* 478 F. 2d 456 (3d Cir. 1973). The statute, moreover, codifies the long-standing, deeply rooted principle of federal equitable jurisdiction which restrains the federal courts from interference with the internal fiscal operations of the states. *Great Lakes Dredge & Dry Dock Co. v. Huffman,* 319 U. S. 293 (1942); *Matthews v. Rodgers,* 284 U. S. 521 (1932). In *Rodgers,* the Court stated:

> "The scrupulous regard for the rightful independence of state governments which should at all times actuate the federal courts, and a proper reluctance to interfere by injunction with their fiscal operations, require that such relief should be denied in every case where the asserted federal rights may be preserved without it." 284 U. S. 525.

This federal policy is no less applicable to actions brought under the Civil Rights Act or those which involve constitutional challenges to state taxes and assessments. *Lynch v. Household Finance Corp.,* 405 U. S. 538, 542, 543 n. 6 (1972); *Bland, supra; Evangelical Catholic Communion, Inc. v. Thomas,* 373 F. Supp. 1344 (D. Vt. 1973);

Mandel v. Hutchinson, 494 F. 2d 364 (9th Cir. 1972); *Klotz v. Consolidated Edison Co. of New York, Inc.,* 386 F. Supp. 577 (S. D. N. Y. 1974). This principle was recently endorsed in *Steffel v. Thompson,* 415 U. S. 452, 472 (1974). *See also Perez v. Ledesma,* 401 U. S. 82 (1971) (Brennan, J. Concurring and dissenting).

Plaintiffs argue nevertheless that the sweeping, absolute language of 42 U. S. C. § 1981 and its jurisdictional analogue, § 1343(3) [9] is sufficient to require an exception in the case at bar. Citing the apparent conflict between § 1343(3) and § 1341, plaintiffs argue that since Congress amended § 1343 as late as 1958 without simultaneously carving an exception into § 1341, the conflict thus created is controlled by the latest amendment of the Civil Rights statute. We must reject this argument. Not only was the Tax Injunction Act enacted long after the Civil Rights Acts and their jurisdictional analogues had been the law—thus suggesting that plaintiffs' logic supports the opposite conclusion—but § 1341 clearly and unequivocally mandates the federal policy of non-interference by federal courts in local fiscal operations which are the product of the administrative expertise of the individual states. Had Congress chosen to create the exception which plaintiffs urge us to create, consistent language could and would have been engrafted into § 1341. We agree that the language of § 1981 is broad and absolute, but we cannot ignore the

9. § 1343 provides:

"The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person:

• • •

"(3) To redress the deprivation, under color of any state law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States."

plain impact of the sweeping and unconditional wording of § 1341.

We thus conclude that the Tax Injunction Act dictates dismissal of the complaint for lack of subject-matter jurisdiction. Even assuming that the precise relief sought by the plaintiffs is, as contended, beyond the purview of the precise statutory remedy designed to correct assessments, plaintiffs have not met their burden of demonstrating that equitable jurisdiction is not available in the Pennsylvania courts, and thus have not shown the lack of an adequate remedy.[10]

Those cases which have upheld federal jurisdiction despite the Tax Injunction Act have all been based on a convincing demonstration of the lack of an adequate remedy in the state courts; *e.g., Hillsborough Township, Somerset County, N. J. v. Cromwell,* 326 U. S. 620 (1946); *United States Steel Corp. v. Multistate Tax Com'n.,* 367 F. Supp. 107 (S. D. N. Y. 1973); *Husbands v. Commonwealth of Pennsylvania,* 359 F. Supp. 925 (E. D. Pa. 1973); *Georgia R. & Banking Co. v. Redwine,* 342 U. S. 299 (1951). In *Hillsborough,* the Court concluded that the uncertainty surrounding the adequate protection of the taxpayer's federal right to equal protection in the state courts was sufficient for the federal court to retain jurisdiction. The uncertainty of the adequacy of the state remedy was generated by numerous factors including the lack of power of the state board of tax appeals to pass upon constitutional issues, the weighty burden on the taxpayer who could not seek to reduce his own assessment, but was limited to an attempt to raise others' assessments to con-

10. Plaintiffs have not attempted to bring their cause into the equity jurisdiction of a state court nor have they protested their assessments to the Board of Assessments. Had such attempts been made and proved to be ineffective, this case might be entirely different. See *Spector Motor Service, Inc. v. O'Connor,* 340 U. S. 602 (1951).

form with his own, and the real possibility that the state's highest court would refuse to hear an appeal in the case. On these factors, the Court concluded that the taxpayer's federal right was so jeopardized that federal jurisdiction was appropriate. In *United States Steel Corp., supra,* since the taxpayer faced the spectre of a multiplicity of suits in separate state courts, although its claim was solely based on the invalidity of the tax on constitutional grounds, the federal court concluded that an effective remedy was not available without federal jurisdiction. In *Georgia R. & Banking Co., supra,* the state courts had already denied injunctive relief on the claim of unconstitutionality and the remedy for refunds protected only a portion of the total taxes collected from the claimant.

Plaintiffs cite *Husbands, supra,*[11] as authority for federal jurisdiction in the instant case. However, the instant case is clearly distinguishable. In *Husbands,* the taxpayers attacked, *inter alia,* the application of a uniform tax millage rate to various districts which had utilized non-uniform assessment ratios. Judge Newcomer refused to dismiss the complaint, which concerned multiple issues not here involved. To the extent pertinent here, the attack there was upon the millage rates and not upon the manner of assessment. Here, the plaintiffs' attack is directed primarily at the variance of individual assessments in a pattern corresponding to the divisions between white and non-white residential areas, which if ultimately proved would require massive reassessments by the defendants. The relief sought here, as opposed to that in *Husbands,* calls for wholesale federal intervention into the normal state statutory procedure for the assessment, levy and collection of property taxes. This has been countermanded by § 1341.

11. By order, March 31, 1975, Judge Newcomer denied an injunction against taxes allegedly levied without equalization of assessment ratios.

There are additional reasons why we should decline jurisdiction of this case. The courts of Pennsylvania are best suited and equipped to pass upon plaintiffs' charges of violations of the Pennsylvania Constitution and the applicable assessment statutes. Moreover, should the plaintiffs prevail on these claims, the federal aspects of the complaint may well be vitiated and mooted. The national policy of eradicating the discrimination which plaintiffs allege compels the state courts to pass on these questions as well as the federal courts. See *Phipps, supra; Kimmey v. Burkheimer,* 376 F. Supp. 49 (E. D. Pa. 1974); *Huffman v. Pursue, Ltd.,* — U. S. — (43 U. S. L. W. 4379) [12]. We conclude, as did Judge Higginbotham in *Kimmey:*

> "• • • Comity requires a recognition by a federal court of the integral significance of a tax collection scheme utilized by a state and its interrelation with the overall fiscal system of that state or its political subdivision." 376 F. Supp. 57.

For the foregoing reasons, we shall enter an order dismissing the complaint.

12. In *Huffman,* the Supreme Court remanded a civil case to allow the district court to determine whether the mandates of *Younger v. Harris,* 401 U. S. 37 (1971) had been met so as to justify federal interference with the state appellate process. The Court stated:

> "• • • [W]e are of the opinion that the consideration of comity and federalism which underlie *Younger* permit no truncation of the exhaustion requirement merely because the losing party in the state court of general jurisdiction believes his chances of success on appeal are not auspicious. Appellee obviously believes itself possessed of a viable federal claim, else it would not so assiduously seek to litigate in the District Court. Yet Art. VI of the Constitution declares that 'the Judges in every State shall be bound' by the Federal Constitution, laws and treaties. *Appellee is in truth urging us to base a rule on the assumption that state judges will not be faithful to their constitutional responsibilities. This we refuse to do.*" [emphasis added]. 43 U. S. L. W. 4385.

IN THE UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF PENNSYLVANIA

—

Civil Action No. 74-2103

—

DONALD F. GARRETT
SHARON B. GARRETT
VERA A. TURPIN

v.

JAMES B. BAMFORD, CHAIRMAN
DAVID SHIREY
STEWART DeTURK
BOARD OF ASSESSMENT APPEALS
COUNTY OF BERKS

Order.

TROUTMAN, *J.*

AND NOW, this 20th day of May , 1975, IT IS ORDERED that defendants' motion to dismiss the complaint is GRANTED.

E. MAC TROUTMAN, *J.*

APPENDIX B.

—

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

—

No. 75-1811

—

DONALD F. GARRETT, SHARON B. GARRETT,
VERA A. TURPIN,
Appellants

v.

JAMES B. BAMFORD, CHAIRMAN, DAVID SHIREY,
STEWART DeTURK, BOARD OF ASSESSMENT
APPEAL, COUNTY OF BERKS

—

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF PENNSYLVANIA

—

D.C. Civil No. 74-2103

—

Argued January 16, 1976

Before GIBBONS, FORMAN, and ROSENN, *Circuit Judges*

—

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Opinion of the Court.

(Filed June 16, 1976)

ROSENN, *Circuit Judge*

Black and poor residents in urban areas across the country have evinced in recent years a growing concern that property tax assessments discriminate against them.[1] Litigation against this discrimination has been notably unsuccessful, primarily due to the bar of the federal Tax Injunction Act of 1937.[2] *See, e.g., Bland v. McHann*, 463 F. 2d 21 (5th Cir. 1972), *cert. denied*, 410 U. S. 966 (1973). This appeal questions whether that statute withholds any federal remedy in an action claiming that the assessment method, as distinguished from the levy or collection of taxes, of the Board of Assessment Appeals of Berks County, Pennsylvania, is racially discriminatory.

1. *See* Clement, *Discrimination in Real Property Tax Assessment; A Litigation Strategy for Pennsylvania*, 36 U. Pitt. L. Rev. 2385 (1974) [hereinafter cited as "Clement"].

2. 28 U. S. C. § 1341 (1970) provides:

The district courts shall not enjoin, suspend or restrain the assessment, levy or collection of any tax under State law where a plain, speedy and efficient remedy may be had in the courts of such State.

The district court held that the action was barred and dismissed the complaint. *Garrett v. Bamford*, 394 F. Supp. 902 (E. D. Pa. 1975). We reverse.

I.

Since this case comes to us from a jurisdictional dismissal granted on defendants' motion pursuant to Fed. R. Civ. P. 12(b)(1), the only "facts" are the allegations of the complaint. These must be taken as true for the purposes of our review. *Walker, Inc. v. Food Machinery*, 382 U. S. 172, 174-5 (1965); *Curtis v. Everett*, 489 F. 2d 516, 518 (3d Cir. 1973), *cert. denied sub nom. Smith v. Curtis*, 416 U. S. 995 (1974).

The named plaintiffs[3] are one non-white and two white homeowners residing in a predominantly non-white area of the City of Reading, Berks County, Pennsylvania. Named as individual defendants are members of the Board of Assessment Appeals of Berks County; the Board is also named as a defendant. Defendants are responsible for assessing the homes of plaintiffs and others residing in Berks County. The gravamen of the complaint is that the *method* of assessing the value of plaintiffs' property, on which real estate and school taxes are based, is intentionally racially discriminatory in violation of 42 U. S. C. §§ 1981, 1983 (1970), and the Fourteenth Amendment.

Plaintiffs allege that their properties are assessed at values which are higher than the values assigned to similar properties in predominantly or exclusively white areas of Berks County. They further contend that their assessments constitute a greater percentage of their properties' actual value than do the assessments of properties in white

3. Plaintiffs sought to represent a class of similarly situated individuals. Because of the jurisdictional dismissal, the district court did not act on the class action question.

areas generally. They claim that the result of the discriminatory assessments is that plaintiffs bear a disproportionately heavy burden in their city and county real estate and school taxes. Plaintiffs aver that this discrimination is systematic and intentional.[4] *Cf. Washington v. Davis,* 44 U. S. L. W. 4789, 4794 (1976).

The chief method of accomplishing this discrimination, according to plaintiffs, is defendants' failure to make annual assessments of property values as required by state law. *See* 72 P. S. § 5344(a) (Supp. 1975). Plaintiffs claim that property values in non-white areas of the county are declining, while values in white neighborhoods are increasing. Failure to make the annual assessments thus results in a tax based on higher than actual value in non-white areas and one based on lower than actual values in white neighborhoods. Accordingly, the principal relief plaintiffs seek is an injunction requiring defendants immediately to cause the assessment of all residential property within the county on a non-discriminatory basis, and to make an annual assessment with proofs submitted to the court to demonstrate that the assessment is uniform and non-discriminatory.

4. Plaintiffs also claim that this discrimination violates state law and seek to invoke the district court's pendent jurisdiction to adjudicate these counts. The exercise of pendent jurisdiction is within the district court's discretion. Hagans v. Lavine, 415 U. S. 528, 545-7 (1974); United Mine Workers of America v. Gibbs, 383 U. S. 715, 726-29 (1966). We leave it to the district court to consider on remand the propriety of hearing these claims.

The complaint contained an additional count alleging that the discrimination was also "based upon the economic status and that of the areas in which [plaintiffs] live," in violation of the federal Constitution and federal law. We express no view on whether this count is within the district court's jurisdiction or states a cause of action; the district court may consider those questions on remand.

II.

Problems such as those presented in this case did not become part of our jurisprudence until the Supreme Court's landmark decision in *Ex Parte Young,* 209 U. S. 123 (1908). By holding that federal courts could enjoin the unconstitutional acts of state officials, the Court caused a major shift in the jurisprudential relationship between the federal government and the states. That decision spurred efforts by the courts and the Congress to limit the broad scope of its application.[5] The Tax Injunction Act has roots in federal equity and comity doctrine developed in Supreme Court decisions after *Ex Parte Young.* The legislative history of the Act, however, demonstrates that Congress addressed the statute to a more circumscribed range of concerns than the broad federalism doctrine developed in the judicial decisions. Our analysis of the current § 1341's applicability to this case must begin with an examination of the legislative and judicial policies underlying the statute.

A. Legislative History

The Congressional materials revealing the purposes of the Tax Injunction Act are brief but clear. Congress became concerned with the practice of large out of state corporations' using diversity jurisdiction to litigate the validity of state taxes in federal courts. The foreign corporations thus gained an advantage over state citizens who generally, under state law, had to pay the tax and then sue for a refund. Furthermore, federal litigation was time consuming and costly; municipalities often be-

5. *See generally* Wright, Law of Federal Courts, §§ 49-52, pp. 186-208 (2d ed. 1970); Bator, et al., Hart and Wechsler's The Federal Courts and the Federal System, pp. 965-1050 (2d ed. 1973) [hereinafter cited as "Hart and Wechsler"].

came strapped for funds and the corporations were able to reach extremely favorable settlements. Local financing was disrupted and foreign corporations escaped a large part of their tax burdens.[6]

It thus appears that the statute had a twofold purpose: eliminating unfair advantage of foreign corporations over citizens of the state and eliminating the ability of foreign corporations interminably to withhold payment of local taxes and to disrupt local financing. *See Tramel v. Schrader,* 505 F. 2d 1310, 1315-6 (5th Cir. 1975); *Hargrave v. McKinney,* 413 F. 2d 320, 325-6 (5th Cir. 1969).

An additional point is worthy of note. In his Senate floor discussion of the Tax Injunction Act, its chief sponsor, Senator Bone, introduced portions of the Judiciary Committee report on the prior Johnson Act,[7] which applied similar restraints to federal injunctions against orders of state administrative agencies. Senator Bone stated that the following quotation was "applicable to [the Tax Injunction Act] in the same manner that [it was] applicable to the Johnson bill." 81 Cong. Rec. at 1416 (1937).

> The wealthy individual or corporation is thus often enabled to wear out his opponent and compel him to settle or submit to an unjust judgment for the very reason that his opponent is not financially able to follow him through the tortuous and expensive route through the Federal court to the Supreme Court of the United States at Washington. *And all the time in this dispute there is no Federal question involved. There is a dispute arising under a State statute or law of other origin and nothing more.*

Id. at 1417 [emphasis supplied]. This excerpt from the Congressional Record, coupled with Congress' apparent concern to limit the ability of *foreign* corporations to use the *diversity* jurisdiction, at least suggests that Congress did not intend the Tax Injunction Act to bar federal courts from entertaining challenges to state taxes when such challenges were based on federal law.

6. *See* 81 Cong. Rec. 1415-1417 (1937) (remarks of Senator Bone); S. Rep. No. 1035, 75th Cong., 1st Sess. (1937); H. R. Rep. No. 1503, 75th Cong., 1st Sess. (1937). The Supreme Court found these materials "convincing evidence of legislative purpose." Department of Employment v. United States, 385 U. S. 355, 358 (1966).

7. 48 Stat. 775 (1934), now codified at 28 U. S. C. § 1342 (1970).

B. Federal Equity Practice

Before the passage of the 1937 Act, the Supreme Court had announced that federal courts of equity would not grant relief against state taxes, even when challenged on constitutional grounds, as long as the state provided an adequate remedy. *See, e.g., Matthews v. Rodgers,* 284 U. S. 521 (1932); *Henrietta Mills v. Rutherford County,* 281 U. S. 121 (1930). In *Matthews,* the Court articulated the rationale of this equity principle:

> The scrupulous regard for the rightful independence of state governments which should at all times actuate the federal courts, and a proper reluctance to interfere by injunction with their fiscal operations, require that such relief should be denied in every case where the asserted federal right may be preserved without it. Whenever the question has been presented, this Court has uniformly held that the mere illegality or unconstitutionality of a state or municipal tax is not in itself a ground for equitable relief in the courts of the United States. If the remedy at law is plain, adequate and complete, the aggrieved party is left to that remedy in the state courts . . . .

284 U. S. at 525-6.

After passage of the 1937 Act, the Court rejected efforts to have federal courts issue declaratory judgments on the validity of state taxes. *Great Lakes Drege & Dock Co. v. Huffman,* 319 U. S. 293 (1943). The Court did not decide whether the Act itself precluded suits, 319 U. S. at 299, but it continued to rely on the principles of the *Matthews* lines of cases:

> Interference with state internal economy and administration is inseparable from assaults in the federal courts on the validity of state taxation . . . .

319 U. S. at 298.

In *Steffel v. Thompson,* 415 U. S. 452, 472 (1974), the Court has recently reaffirmed the comity principles of *Matthews* and *Great Lakes. See also Moe v. The Confederated Salish and Kootenai Tribes of the Flathead Reservation,* 44 U. S. L. W. 4535, 4537 (1976); *Lynch v. Household Finance Corp.,* 405 U. S. 538, 542 n. 6 (1972); *Perez v. Ledesma,* 401 U. S. 82, 126-8 and n. 17 (1971), (Brennan, J., concurring).

From this review of the legislative history of the 1937 Act and federal equity practice, it appears that, as a general rule, injunctive or declaratory relief against state taxes can be sought in federal court only when the forums provided by the state are inadequate to the task. We turn then to an examination of the remedies provided these plaintiffs under Pennsylvania law.

III.

Under the 1937 Act, the inquiry into state remedies seeks to ascertain whether the state, in this case Pennsylvania, provides plaintiffs with a "plain, speedy, and efficient remedy" for adjudicating the claims alleged in their complaint. Supreme Court decisions construing this

statutory language offer two essential points of guidance. First, although it can be argued that Congress meant to establish a more stringent standard for federal intervention, the decisions indicate that "plain, speedy and efficient" means no more than the prior equity standard of "adequacy." Second, it is sufficient for a finding of inadequacy that the availability of the state remedy be merely uncertain. Hart and Wechsler, *supra,* note 7, at 979. *Spector Motor Service, Inc. v. O'Connor,* 340 U. S. 602, 605 (1951); *Township of Hillsborough v. Cromwell,* 326 U. S. 620 (1946); *Spector Motor Service, Inc. v. McLaughlin,* 323 U. S. 101 (1944).

A. Pennsylvania Equity Practice

If plaintiffs could bring this action in Pennsylvania courts of equity, they would have an adequate remedy. We must initially determine, then, whether Pennsylvania equity courts would entertain this challenge to the practices in Berks County assessments.

In recent years, the Pennsylvania Supreme Court has frequently had the opportunity to consider the question of equity jurisdiction to hear challenges to local taxes. In *Lynch v. Owen J. Roberts School District,* 430 Pa. 461, 244 A. 2d 1 (1968), the Court faced a challenge to an occupational tax. Writing for five justices, Justice Roberts agreed "with the general proposition that equity will not entertain an action where plaintiff has an adequate statutory remedy at law," but recognized an exception to that rule "where the controversy involves a challenge to the constitutional validity of a taxing statute . . . ." 244 A. 2d at 3. Justice Cohen dissented, citing his dissent in *Studio Theaters, Inc. v. City of Washington,* 418 Pa. 73, 209 A. 2d 802 (1965), where he had argued that under the statute enacting the occupational tax plaintiffs had an adequate

remedy and that denied the power of equity to intervene, even in a constitutional matter.

Two years later Justice Cohen's view appeared to become the law. Writing for a four-justice majority in *Rochester & Pittsburgh Coal Co. v. Board of Assessment*, 438 Pa. 506, 266 A. 2d 78 (1970), he stated:

> what is required to confer jurisdiction on an equity court is the existence of a substantial question of constitutionality (and not a mere allegation) and the absence of an adequate statutory remedy.

266 A. 2d at 79. The opinion went on to imply that equity would never have jurisdiction in cases challenging real estate taxes. *Id.* Justice Roberts, joined by Chief Justice Bell, dissented, arguing that *Studio Theaters* and *Lynch* allowed jurisdiction when, as in the case before him, the constitutionality of the method of assessment was at issue.

Most recently, Justice Pomeroy made a concerted effort to reconcile these divergent cases,[8] but failed to carry a majority of the Court. *Borough of Green Tree v. Board of Property Assessments*, 328 A. 2d 819 (1947). The opinion first appears to reaffirm the rule of *Rochester:* for equity to take jurisdiction there must be a constitutional question and "either the absence of a statutorily prescribed remedy or, if such a remedy exists, then a showing of its inadequacy in the circumstances." 328 A. 2d at 823. The determination of the adequacy of the statutory remedy, in Justice Pomeroy's view, apparently involved a balancing test. *See* 328 A. 2d at 825. Applying that test, he concluded that the statutory remedy was not adequate for

8. Some effort to reconcile *Rochester* and *Lynch* was made in Crosson v. Downingtown Area School District, 440 Pa. 468, 270 A. 2d 377 (1970), and Campbell v. Coatesville Area School District, 440 Pa. 496, 270 A. 2d 385 (1970), two cases considering challenges to occupational taxes.

dealing with a direct challenge to the constitutionality of a section of the Second Class County Assessment Law, 72 P. S. § 5452.7 (1968). *Id.* at 825.

Justice Pomeroy's opinion attracted only one adherent. Chief Justice Jones and Justices Eagan and Nix dissented without opinion. Justice Manderino was noted as concurring in the result. Only Justice O'Brien joined Justice Pomeroy, but Justice O'Brien also joined the concurring opinion of Justice Roberts, who adhered to the teaching of *Lynch* and criticized Justice Pomeroy's balancing analysis as confusing and unnecessary.

This review of Pennsylvania decisions illustrates the degree to which the Justices of the Pennsylvania Supreme Court have differed on the reach of equity jurisdiction in tax matters. Fortunately, we need not divine the ultimate outcome of their analytical labors. The latest Pennsylvania decision on equity jurisdiction over a constitutional challenge to a property tax that commanded a majority of the Court, *Rochester & Pittsburgh Coal Co. v. Board of Assessment, supra,* appears to govern this case. There plaintiffs sought "to enjoin application of a revised *method* of taxation." 266 A. 2d at 78 [emphasis supplied]. The dissenting opinion reveals that the challenge in that case was comparable to the one now before us. The coal company apparently argued that the county had violated the uniformity requirement of the Pennsylvania constitution[9] by taxing "property owners in one locality on the basis of recent valuations while utilizing older, lower valuations for calculating the taxes due from taxpayers owning property in other portions of the county . . . ." 266 A. 2d at 82. Thus, *Rochester* appears to bar this case from a Penn-

9. Pa. Const. art. 8, § 1 states: All taxes shall be uniform, upon the same class of subjects, within the territorial limits of the authority levying the tax, and shall be levied and collected under general laws.

sylvania equity court simply due to the similarity between the complaints. Moreover, the Court denied equity jurisdiction on the analysis that:

> [i]n the real estate tax area most of the grave constitutional questions have already been decided, and most of the actions, including this one, question not the underlying statute but rather its application. In such a situation, the administrative body which has responsibility for applying the statute on a day-by-day basis should have the first opportunity of studying and ruling on any new application.

Id. at 79. This language suggests that any challenge, as in the case before us, to the method of application of a taxing statute will not find an equity forum in Pennsylvania.

Nothing in *Greentree* suggests that *Rochester* would not govern this case.[10] Nor is there language in any of the other Pennsylvania decisions we have reviewed which would mitigate the application of *Rochester* to this case. *Lynch*, for example, recognized an exception to equity's

10. Justice Pomeroy's opinion noted that the case presented "a frontal attack on the constitutionality" of a taxing statute. 328 A. 2d at 825. He upheld equity jurisdiction because the complaint challenged the constitutionality of the underlying statute rather than its method of application. Justice Roberts' concurrence, 328 A. 2d at 826-8, was limited to reaffirming his agreement with *Lynch*, and did not extend to his dissenting argument in *Rochester* that method challenges come within the jurisdiction of equity. Justice O'Brien joined both opinions; since Justice Roberts did not go as far as his *Rochester* dissent, Justice O'Brien cannot be understood to have wavered in his support of *Rochester*. Three justices dissented without opinion, thereby indicating their view that even the "frontal attack" in *Greentree* did not create equity jurisdiction. Two of those justices, Jones and Eagan, had voted with the *Rochester* majority. Thus, *Greentree* reveals that there are at least four justices—Pomeroy, O'Brien, Jones, and Eagan—who continue to adhere to the view that equity does not have jurisdiction over cases alleging that the method of application of a taxing statute is unconstitutional.

traditional abstention from tax cases "where the controversy involves a challenge to the constitutional validity of a *taxing statute* . . ." 244 A. 2d at 3 [emphasis supplied], thereby suggesting that the exception extends only to attacks on the underlying statute. *Studio Theaters, Inc. v. City of Washington*, 418 Pa. 73, 209 A. 2d 802, 805 (1965), reaffirmed this principle. *See also Narehood v. Pearson*, 374 Pa. 299, 96 A. 2d 895 (1953); *County of Allegheny v. Three Rivers Management Corporation*, 16 Pa. Com. 361, 328 A. 2d 567, 569 (1974); *Borough of Crafton v. Board of Property Assessments*, 7 Pa. Com. 291, 298 A. 2d 643, 648 (1972).[11] Indeed, an extensive study of Pennsylvania tax cases by one commentator finds "no case on record where a Pennsylvania court has enjoined the collection of a tax on the grounds that the method of assessment was unconstitutional." [12]

This analysis of Pennsylvania decisions creates substantial uncertainty as to the availability of a Pennsylvania equity forum for the instant complaint. Following *Township of Hillsborough v. Cromwell* and the two *Spector Motor Service* cases, *supra*, we conclude that plaintiffs do not have a "plain, speedy and efficient" remedy in Pennsylvania equity courts.

B. Administrative Appeal with Judicial Review.

The statutory remedy referred to in the foregoing Pennsylvania cases is contained in the assessments legislation for counties of the third class, 72 P. S. § 5342 et seq.

11. Language in *Young Men's Christian Ass'n v. City of Reading*, 402 Pa. 592, 167 A. 2d 469 (1961) may suggest that a constitutional challenge to "official action" taken under a taxing statute would be within the equity jurisdiction. 167 A. 2d at 472. However, it is the only Pennsylvania case in which one might read that suggestion, it cites no authority, and has not been followed in later decisions.

12. *Clement, supra*, note 1, at 302.

(Supp. 1975).[13] The statute creates a three-member Board of Assessment Appeals, 72 P. S. § 5342 (Supp. 1975), which must cause annual assessment of property within its jurisdiction. 72 P. S. § 5344 (Supp. 1975). Assessments must be completed by the fifteenth of August of each year, 72 P. S. § 5347 (1968), and property owners must be duly notified. 72 P. S. § 5348 (1968). "Any person aggrieved by any assessment, whether or not the value thereof shall have been changed since the preceding annual assessment . . . my appeal to the board for relief." 72 P. S. § 5349(c) (Supp. 1975). Parties must be notified of hearings and the board has "the power to compel the attendance of witnesses and the furnishing of documents." 72 P. S. § 5349(d) (Supp. 1975). A final decision of the board may be appealed to the court of common pleas, which may proceed de novo. 72 P. S. § 5350 (Supp. 1975).

> In the case of real property, the court shall determine, from the evidence submitted at the hearing, what ratio of assessed value to actual value was used generally in the taxing district, and the court shall direct the application of the ratio so found to the value of the property which is the subject matter of the appeal. . . .

Id. Decisions of the court of common pleas may be appealed. *Id.*

This statutory remedy is clearly designed for an individual taxpayer to appeal his individual assessment. *See Narehood v. Pearson,* 374 Pa. 299, 96 A. 2d 895, 898 (1953); *Sharkey v. Showers,* 18 Pa. Com. 363, 336 A. 2d 453 (1975). Indeed, the Pennsylvania Commonwealth

13. Pennsylvania counties are divided into nine classes for the purposes of legislation and the regulation of their affairs. 16 P. S. § 210 (Supp. 1975). Berks County is a county of the third class.

Court recently upheld a lower court's rejection of an effort to form a class action out of an individual appeal from a board decision. *Sharkey v. Showers, supra,* 336 A. 2d at 454. An alternative reason for the court's decision was that a class action does not lie when the members of the class have failed to exhaust their administrative remedies. *Id.*

In the instant case, the plaintiffs claim that they and the members of the class they represent have been assessed at values higher than comparable property in white neighborhoods and that the ratios of their assessed value to actual value is higher than in all-white neighborhoods. The lack of a class action mechanism would impose substantial expense on plaintiffs' efforts to prove their case before the board and the common pleas court. Each individual taxpayer would have to produce evidence of the fair market value of his property before he could establish the ratio of assessed value to actual market value. "The determination must be ultimately made on the basis of competent testimony, as to the worth of the property in the market at a fair sale." *Deitch Company v. Board of Property Assessment,* 417 Pa. 213, 209 A. 2d 397, 402 (1965). In order to establish discrimination, and thus the lack of uniformity of assessments in the taxing district, he then must produce relevant evidence to show the overall current assessment ratio in the rest of the taxing district. There are several methods by which this can be done, as adverted to in *Deitch Company, supra,* but each will require proof by relevant evidence of actual market value of other properties whose assessment ratios are used as a basis of comparison.[14] Such evidence will in all probability require expert testimony.

14. Plaintiffs argue, citing In re Rick's Appeal, 402 Pa. 209, 167 A. 2d 261 (1961), and In re Brooks Building, 391 Pa. 94, 137 A. 2d 273 (1958), that Pennsylvania law would bar them from introduc-

Gathering this evidence and hiring the necessary expert witnesses can be very expensive. The members of the class plaintiffs claim to represent probably could share the cost of gathering the evidence, as they could do in a class action. However, because the Pennsylvania procedure requires each person to bring a separate review action, each would have to pay his own filing fees, attorney's fees, and expert witness' fees; these costs could not be consolidated as they could be in a class action.

These duplicative costs might be avoided if classwide relief could be obtained from an individual review action. However, *Sharkey v. Showers,* by holding that each individual must first exhaust his administrative remedy before seeking review from the courts, indicates that each person would have to bear the expense of proceeding before the Board. Furthermore, there is no indication in the Pennsylvania statute or decisions construing it that the relief granted by the Board or the reviewing courts can extend beyond the individual taxpayer.

Thus, the litigational expense of the Pennsylvania statutory review procedures can be forbidding, if not insurmountable, for the individual taxpayer. Since, according to the allegations of the complaint, many of the putative class members are in the lower economic brackets, the totality of these costs could effectively bar any attack on the allegedly discriminatory tax structure. This is pre-

14. (Cont'd.)
ing evidence of assessed value to actual value ratios for property in neighborhoods other than their own and thus that they could not, in any event, prove the discrimination alleged. The more recent decision in McKnight Shopping Center, Inc. v. Board of Property Assessment, 417 Pa. 234, 209 A. 2d 389 (1965), and Deitch Company v. Board of Property Assessment, 417 Pa. 213, 209 A. 2d 397 (1965), clearly indicate that assessment ratios in the entire taxing district may be introduced. *See, e.g., Deitch, supra,* 209 A. 2d at 403.

cisely the kind of situation—where courts and multiple parties must endure the expense, inconvenience, and inefficiency of separate actions at law involving the same issue and a common defendant, which might deter large groups of individuals from seeking judicial relief—that prompted equity to develop the forerunner of today's class action mechanism. *See* Wright & Miller, Federal Practice and Procedure: Civil § 1751.

Where legal remedies require multiple suits involving identical issues against the same defendant, federal equity practice has recognized the inadequacy of the legal remedy and has provided a forum. *Matthews v. Rodgers,* 204 U. S. 521, 529-30 (1932); *Hale v. Allinson,* 188 U. S. 56, 78 (1903). *See* 16 Minn. L. Rev. 679, 683 (1932). *Matthews* rejected a multiplicity argument in favor of jurisdiction, but did not deny the application of this equity principle to federal litigation over state taxes. Rather, the opinion found that the plaintiffs in that case did not present common issues. Their allegation that the challenged tax statute was an unconstitutional burden on interstate commerce as applied to each of their businesses tendered issues "between them and the adverse party [which were] not necessarily identical." 284 U. S. at 530. Here, by contrast, the factfinding process and the issues will be identical for each plaintiff and their common adversary, for the complaint alleges not the unlawful assessment imposed on each taxpayer individually, but the unconstitutionality of the method of assessment as applied to them as a group. In this posture, the issues of law and fact tendered by plaintiffs meet the traditional requirements for equitable intervention.

Moreover, adjustment of plaintiff's taxes in one year will not necessarily prevent repetition of disparate assessments in succeeding years. If, as plaintiffs have alleged,

the Board's discriminatory assessment pattern is intentional and systematic, the discrimination could be repeated. Plaintiffs may be required to undergo the administrative appeal route again, expending additional time, effort, and money. *In futuro* relief is not available from the statutory procedure; it acts only for the current year and for the individual taxpayer.[15] Where a state remedy for an allegedly unlawful tax requires repetitive suits year after year, "[r]esort may be had to equity . . . to avoid the multiplicity of suits . . . ." *Graves v. Texas Company*, 298 U. S. 393, 403 (1936).

We conclude that the Pennsylvania statutory review procedure does not provide these plaintiffs with the "plain, speedy and efficient remedy" required by section 1341 or federal equity principles. Combining this conclusion with our previous determination of the inadequacy of Pennsylvania equitable remedies, we believe that Pennsylvania law does not provide a "plain, speedy and efficient remedy" for plaintiffs' complaint.[16] Its rigid statutory pro-

15. We do not imply the precise relief plaintiffs request must be available to afford an adequate remedy. It is clear, however, that plaintiffs' claims, if true, will require some form of continuing relief which is not available from the statutory review procedure.

16. The district court reached a contrary result by speculating on the availability of Pennsylvania remedies. He recognized that the statutory procedure is designed to accommodate the "ordinary" situation of "individual appeals within a taxing district . . .," but relied on the "ingenuity" of assessment authorities and state courts to find a "realistic and non-technical construction" of the statute that would allow them to reach the issues tendered by plaintiffs. 394 F. Supp. at 906. He apparently also recognized that *Rochester* posed a substantial bar to Pennsylvania equity jurisdiction, but concluded without analysis of other cases that the "particular pitch of this case . . . is such that it is cognizable in a court of equity in Pennsylvania . . . ." 394 F. Supp. at 907. Not only is this approach unsupported speculation, but it ignores the federal standard that a state remedy is inadequate if its availability is uncertain. Spector Motor Service, Inc. v. O'Connor, 340 U. S. 602 (1951); Township of Hillsborough v. Cromwell, 326 U. S. 620 (1946).

cedures are not designed to protect the federal constitutional rights of taxpayers—"especially freedom from racial discrimination—from violation by state officials." *Clement*, note 1, *supra*, at p. 279.[17]

IV.

Applying our conclusion precisely to these proceedings, we hold that when plaintiffs allege systematic and intentional class-based racial discrimination in tax assessments, Pennsylvania law does not provide a "plain, speedy and efficient remedy." Thus, a federal action seeking injunctive relief to alleviate the alleged discrimination is not barred by 28 U. S. C. § 1341. The district court, therefore, had jurisdiction over plaintiffs' cause of action.

Our holding is fortified by our previous review of the legislative history of section 1341 and it is undiminished by the policy underlying federal comity doctrine in the state taxation area. The facts of this case do not present the problems Congress addressed in section 1341; indeed, a contrary situation is presented. As Section II of this opinion sets forth, Congress sought by section 1341 to attack out-of-state corporations' use of the diversity jurisdiction to impose burdensome litigation on local governments and avoid paying local taxes. A denial of a federal forum in the instant case would allow a state to depend upon burdensome piecemeal review procedures as an effective defense to an allegedly unconstitutional tax structure.

17. In his dissenting opinion in *Rochester, supra*, Judge Roberts also criticized the ineffectiveness of Pennsylvania's statutory remedies in resolving constitutional challenges to taxing schemes, stating:

> "If a tax is inherently constitutionally defective, there is no reason to confine those affected to narrow statutory remedies. Why should every property owner in [the taxing district] have to assume the burden of appealing the propriety of his payment when the large questions could expeditiously and effectively be resolved in a single suit?

Such a result would stand the legislative intent of section 1341 on its head.

We further note that a federal hearing on plaintiffs' allegations will not produce the interference with state fiscal affairs that section 1341 and federal comity doctrine seek to avoid. If the district court finds that plaintiffs' claim has merit, it can and should mold relief so that Berks County can continue to receive tax revenues. Indeed, a beneficial result of this suit may be that assessments in the entire taxing district will be raised, thereby increasing county treasury revenues.

Accordingly, the judgment of the district court will be reversed and the case remanded for further proceedings.

APPENDIX C.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 75-1811

DONALD F. GARRETT, SHARON B. GARRETT, VERA A. TURPIN,
Appellants

v.

JAMES B. BANFORD, CHAIRMAN
DAVID SHIREY, STEWART DeTURK
BOARD OF ASSESSMENT APPEAL
COUNTY OF BERKS

(D. C. Civil Action No. 74-2103)

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Present: GIBBONS, FORMAN and ROSENN, *Circuit Judges*

Judgment.

This cause came on to be heard on the record from the United States District Court for the Eastern District of Pennsylvania and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court, filed May 21, 1975, be, and the same is hereby reversed and the cause is remanded for further proceedings in accordance with the opinion of this Court. Costs are taxed against the appellees.

ATTEST:

THOMAS F. QUINN,
Clerk.

June 16, 1976

APPENDIX D.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 75-1811

DONALD F. GARRETT, SHARON B. GARRETT, VERA A. TURPIN,
Appellants

v.

JAMES B. BAMFORD, ET AL.

Pursuant to Rule 41(b) of the Federal Rules of Appellate Procedure, it is ORDERED that issuance of the certified judgment in lieu of formal mandate in the above cause be, and it is hereby stayed until August 6, 1976.

MAX ROSENN,
Circuit Judge.

Dated: July 9, 1976

APPENDIX E.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 75-1811

DONALD F. GARRETT, SHARON B. GARRETT, VERA A. TURPIN,

Appellants

v.

JAMES B. BAMFORD, CHAIRMAN, DAVID SHIREY, STEWART DeTURK, BOARD OF ASSESSMENT APPEAL, COUNTY OF BERKS

Pursuant to Rule 41(b) of the Federal Rules of Appellate Procedure, it is ORDERED that issuance of the certified judgment in lieu of formal mandate in the above cause be, and it is hereby further stayed until August 20, 1976. If within the period of the additional stay, notice is filed with the clerk of this Court by the clerk of the Supreme Court that appellees have filed a petition for a writ of certiorari in that Court, the stay herein granted by this Court shall continue until final disposition of the case by the Supreme Court.

MAX ROSENN,
Circuit Judge.

Dated: August 10, 1976

APPENDIX F.

72 P. S.

§ 5342. *Appointment by county commissioners; salaries; termination of certain offices*

In all counties of the second A and third class in this Commonwealth, there is hereby created a board, to be known as the Board of Assessment Appeals, which shall be composed of three members. The members of said board shall be appointed by the county commissioners of such counties to serve for terms of four years each. Vacancies happening in said office shall be filled by appointment by the county commissioners for the unexpired terms. The salary of the members of said board shall be fixed by the salary board of the county.

The terms of office of any person any now acting as members of any such board for the assessment and revision of taxes in any such county of the third class shall cease and terminate, and the duties and terms of the borough, ward, and township assessors in such counties, so far as assessments for taxation are concerned, shall cease and terminate upon the passage and approval of this act by the Governor.

§ 5344. *Assessments, listing, valuations and exemptions for tax purposes; land subject to restrictive covenant*

(a) It shall be the duty of said board, in each county to which this act applies, to make and have supervisicn of the making of annual assessments of persons, property and occupations now or hereafter made subject to assessment for taxation for county, borough, town, township, school, poor and institution district purposes, and to make and

have supervision of listing and valuation of property excluded or exempted from taxation. In making assessments of property at less than actual value, it shall accomplish equalization with other properties within the taxing district. The making of triennial assessments as provided by existing law is hereby abolished.

(b) With reference to land that is subject to a restrictive covenant under the provisions of the act of January 13, 1966 (P. L. 1292), entitled "An act enabling certain counties of the Commonwealth to covenant with land owners for preservation of land in farm, forest, water supply, or open space uses," the board shall determine the actual value with the restrictive covenant attached and the assessment shall be based thereon. The board shall also determine the actual value without the restrictive covenant and upon violation of the covenant the assessment shall be based thereon.

§ 5347. *Powers and duties of assessors; penalty; fifth class county advancing to third class*

(a) The subordinate assessors shall make the annual assessment of all property and persons, taxable upon occupations, subject to assessment for taxation for aforesaid purposes, together with a list of all persons subject to a school per capita tax or a poll tax, within their respective districts, and, in so doing, shall view all properties in their district taxable for said purposes, and in assessing such properties at less than actual value, shall accomplish equalization with other properties within the taxing district. They shall make a personal house to house canvass for their district, in order that the lists of persons taxable upon occupation or subject to a school per capita tax or poll tax may be accurate and correct insofar as it is possible to make them. They shall also have and possess,

except as modified by this act, the same powers and perform the same duties and be subject to the same liabilities as are now or shall hereafter be conferred or imposed upon borough, ward, town, and township assessors with respect to making assessments and valuations for taxation purposes. All such assessors who shall fail to make assessments and lists in the manner herein provided shall be guilty of a misdemeanor, and, upon conviction thereof, shall be sentenced to pay a fine not exceeding five hundred dollars, and, in default of the payment of such fine and costs, to undergo an imprisonment not exceeding ninety days.

(b) Notwithstanding any other provisions of this act, any county of the fifth class the classification of which has been ascertained according to its population by reference to the last preceding decennial United States census, and certified and recorded pursuant to section 211 of the act of August 9, 1955 (P. L. 323), known as "The County Code",[1] to be advanced in classification to a county of the third class, shall continue to operate a tax assessment system under the provisions of the act of May 21, 1943 (P. L. 571), known as "The Fourth to Eighth Class County Assessment Law",[2] and continue the permanent system of records, including tax maps of the entire county, property record cards, and property owner's index and continue to take into consideration the value of property as indicated by the use of said permanent system of records, cost, charts and land values applied on the basis of zones and districts as well as the price for which property would bonafidely sell in accordance with the requirements of the act of May 21, 1943 (P. L. 571), known as "The Fourth to Eighth Class County Assessment Law", as amended.

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1. Section 211 of Title 16.
2. Section 5453.101 et seq. of this title.

§ 5348. *Revision of assessments and valuations by board; assessment roll; exemption list*

The said board shall, on or before the first day of August, examine and revise the said annual assessments and valuations, increasing or decreasing the same as in their judgment may seem proper, and shall add thereto and assess such property or persons taxable upon occupations as may have been omitted, and may also add thereto the names of any persons subject to a school per capita tax or poll tax as may have been omitted; and such added assessments may be used for the taxation of the property and persons only for the current year and the preceding three years if there was liability for such taxes under existing law.

The board shall, on or before the fifteenth day of August, prepare an assessment roll or list of persons and property subject to local taxation, together with the value placed upon each person and each parcel or tract of real property. The board shall at the same time prepare a list of all property exempted by law from taxation.

§ 5349. *Inspection of rolls; notices; appeals; correction of rolls; delivery of copies; certification of values*

(a) The assessment roll shall be open to public inspection at the office of the board at the county seat during ordinary business hours of each business day from the time of completion to and including the first day of September. Upon completion of the assessment roll, the board shall give notice by publication once in one or more newspapers published in the county that such assessment roll has been completed and the place and times when such roll will be open for inspection, and shall, in the same notice, state that any person desiring to appeal from any assessment shall file with the board, on or before the first day of

September, an appeal, in writing, designating the assessment appealed from.

(b) The board shall within five days of completing the assessment roll cause to be mailed to each owner of property or person assessed and taxing district having any interest therein, the value of whose property or personal assessment has not theretofore been separately fixed or the value of whose property or personal assessment has been changed from that finally fixed in the preceding assessment roll, at his last known address, a notice of such change and the amount of the old assessment, if the property or personal assessment was previously separately assessed, and the amount of the new assessment. Such notice shall state that any person aggrieved by any assessment and the said taxing districts may appeal to the board for trial by filing with the board, on or before the first day of September, an appeal, in writing, designating the assessment or assessments by which such person is aggrieved and the address to which notice of the time and place for a hearing of the appeal shall be mailed.

(c) Any person aggrieved by any assessment, whether or not the value thereof shall have been changed since the preceding annual assessment, or any taxing district having an interest therein, may appeal to the board for relief. Any person or such taxing district desiring to make an appeal shall, on or before the first day of September, file with the board an appeal, in writing, setting forth:

(1) The assessment or assessments by which such person feels aggrieved;

(2) The address to which the board shall mail notice of the time and place of hearing.

(d) On the first business day after the first day of September, the board shall meet for the hearing of appeals

and shall continue to meet for such purpose from time to time until all appeals have been heard and acted upon. The board shall have the power to compel the attendance of witnesses and the furnishing of documents. All appeals shall be heard and acted upon not later than the first day of October. The board shall notify each person and each taxing district having an interest therein who has filed an appeal of the time and place of hearing on said appeal by depositing such notice in the mail addressed to such person at the address designated in the appeal not later than the tenth day preceding the day designated in the notice for such appearance. Any person or such taxing district who shall fail to appear for hearing at the time fixed shall be conclusively presumed to have abandoned his appeal.

§ 5350. *Appeals to court*

(a) After action on such assessments by said board, any dissatisfied taxable or taxing district may, within thirty days from the final fixing of his assessment and valuation, appeal therefrom to the court of common pleas of the said county in the manner provided by law for appeals from assessments; and it shall be the duty of the court at once to hear and determine said appeal, and, if necessary, to make such changes therein as may be right and proper. In the case of real property, the court shall determine, from the evidence submitted at the hearing, what ratio of assessed value to actual value was used generally in the taxing district, and the court shall direct the application of the ratio so found to the value of the property which is the subject matter of the appeal, and such shall be the assessment. From the decision of the court, an appeal may be taken and the taxable and/or taxing district having an interest therein who participated in the hearing before the court of common pleas shall be named as the appellees in any such appellate appeal.

(b) In any appeal by a taxable from an action by the board, the board shall have the power and duty to present a prima facie case in support of its assessment, to cross-examine the taxable's witnesses, to discredit or impeach any evidence presented by the taxable, to prosecute or defend an appeal in any appellate court, and to take any other necessary steps to defend its valuation, assessment and assessment ratio.

§ 5350d. *Effect of appeal; exoneration*

No appeal taken from any such assessments made under the provisions of this act [1] shall affect the validity of any taxes assessed, but if such assessment shall thereafter be reduced, an exoneration shall be granted or restitution ordered for the excess of taxes paid by reason of any improper increase in the assessment.

1. Section 5342 et seq. of this title.